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IN THE

Supreme Court of the United States

October Term 1974

No. 74-627

JAMES LEROY NELSON,

Petitioner,

vs.

STATE OF SOUTH DAKOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the
State of South Dakota

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the
State of South Dakota

The Petitioner, James LeRoy Nelson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of South Dakota entered in this proceeding July 11, 1974, a petition for rehearing of which was denied August 16, 1974.

OPINION BELOW

The opinion of the Supreme Court of South Dakota, reported at 220 N.W.2d 2, is attached in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of South Dakota was entered on July 11, 1974, and a petition for rehearing was denied on August 16, 1974. This Petition is filed within ninety days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether Petitioner was denied a fair trial and due process of law by the erroneous admission in evidence, as a dying declaration, of the deceased's interrogatory hearsay statement inferentially accusing Petitioner, where there was no evidence that the deceased was speaking in the belief of his impending death?

CONSTITIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

SDCL 23-44-4:

Dying declarations are statements of material facts concerning the cause and circumstances constituting the res gestae of any of the following felonies to wit: homicide, rape, as rape is defined in subdivisions (3) and (4) of §22-22-1, and abortion, as abortion is defined in §22-17-1, made by the victim voluntarily while sane and under the fixed and solemn belief that his death is inevitable and near at hand.

In all prosecutions for the following felonies to wit: homicide, rape, as rape is defined in subdivisions (3) and (4) of §22-22-1, and abortion, as abortion is defined in §22-17-1, the dying declarations of the deceased, as defined in this section, are always admissible in evidence, provided the deceased would be a competent witness if living.

All such declarations are also admissible in behalf of the defense.

STATEMENT OF THE CASE

Jursdiction of the Circuit Court of Minnehaha County, South Dakota, was invoked in this matter in the first instance by an information charging Petitioner and one Pickering with murder. Petitioner was convicted of second degree manslaughter, and the Supreme Court of South Dakota affirmed the conviction on July 11, 1974. A petition for rehearing was denied August 16, 1974.

The evidence at trial viewed most favorably to the verdict showed that on October 4, 1971, Patrick Pickering gave some capsules to one Wayne Sherwood in Petitioner Nelson's presence. (All three were inmates of the South Dakota State Prison at Sioux Falls at the time. (R., 439-440)) Shortly thereafter Sherwood became ill while sitting with one Wescott, another inmate, in the presence of one Hempel. Over strenuous defense objection Hempel was permitted to testify, on the theory that it was a dying declaration, that Sherwood said to him after he became ill:

> Your don't think Nelson and Pickering would give me any bum pills, do you? (R., 253)

A Special Agent of the Attorney General's office quoted Hempel as having told him Sherwood said:

> You don't think Pat [i.e., Pickering, not Petitioner Nelson] would give me some bum pills, do you? (R., 487)

Westcott, over the same defense objection, was permitted to testify that after Sherwood started becoming ill he mentioned some blue pills; Westcott went on:

> I had told "Butch" [Sherwood] several times prior to this that if he kept taking pills he was going to get ahold

> of some bad pills, you know, and so I asked him again if he had taken any pills and he didn't say anything and I said, "Have you been taking pills, 'Butch'? I told you you was going to get ahold of some bad ones." And he said, "You don't think Pat and him would do anything like that to me?" And I said, "Did you take some pills from that son-of-a-bitch?" And he said, "Yes, I did." (R., 372)

Not long after this conversation Sherwood died, of strychnine poisoning as it was later determined. (R., 180) Pickering's wife had delivered some strychnine to Pickering shortly before. (R., 417)

The remainder of the evidence is reviewed in the Court's opinion, attached in the appendix; this Petition addresses only the question of the admissibility of the statement recited above, although the insufficiency of the evidence to sustain the verdict was asserted on appeal.

The South Dakota Supreme Court rejected Petitioner's argument on appeal that the highly damaging statement of the deceased was inadmissible under either the applicable South Dakota statute or the controlling decision in *Shepard v. United States*, 290 U.S. 96 (1933), upon which Petitioner relied, but the South Dakota Court failed even to cite *Shepard* either in the opinion affirming Petitioner's conviction or in the separate affirmance of Pickering's conviction, *State v. Pickering*, —— S.D. ——, 217 N.W.2d 877 (1974).

REASONS FOR GRANTING THE WRIT

PETITIONER WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE USE IN EVIDENCE OVER OBJECTION OF THE ACCUSATORY WORDS OF THE DECEASED UNDER THE MANIFESTLY ERRONEOUS APPLICATION OF THE EVIDENTIARY DOCTRINE OF DYING DECLARATIONS AS AUTHORITATIVELY CONSTRUED BY THIS COURT.

Dying declarations have traditionally been an exception to the hearsay exclusionary rule upon the often-disputed theory that veracity is assured by the solemnity of the declarant's fixed belief in his sure and impending demise. The very existence of the exception itself doubtless deserves plenary reconsideration, because of its anachronistic rationale, and the inevitably harsh impact of the unconfrontable deceased's own words against his accused killer in a homicide case. But while we believe a review of the Constitutional validity of the doctrine itself by this Court would be of great value to the interests of justice in the trial courts,[1] the present case might be disposed of upon the narrower ground that the rule was here violated to Petitioner's prejudice.

In the unanimous opinion in *Shepard v. United States*, 290 U.S. 96 (1933), Mr. Justice Cardozo examined the question definitively in a context strikingly similar to that in Petitioner's case, reversing Shepard's conviction for murder by poisoning on the ground that the decedent's accusatory declaration was not shown to have been made in the peculiar circumstances which admissibility requires:

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[1] The exception is preserved in the Federal Rules of Evidence, Rule 804(b)(3). See the Advisory Committee's Note for the rationale, and 5 Wigmore §1443.

To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death. The record furnishes no proof of that indispensable condition.

. . . . .

Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be "a settled hopeless expectation" (citation omitted) that death is near at hand, and what is said must have been spoken in the hush of its impending presence (citations omitted). Despair of recovery may indeed be gathered from the circumstances if the facts support the inference (citation omitted). There is no unyielding ritual of words to be spoken by the dying. Despair may even be gathered though the period of survival outruns the bounds of expectation. Wigmore, Ev. §1441. What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The patient must have spoken with the consciousness of a swift and certain doom.

What was said by this patient was not spoken in that mood. There was no warning to her in the circumstances that her words would be repeated and accepted as those of a dying wife, charging murder to her husband, and charging it deliberately and solemnly as a fact within her knowledge. To the focus of that responsibility her mind was never brought. She spoke as one ill, giving voice to the beliefs and perhaps the conjectures of the moment. . . . She did not speak as one dying, announcing to the survivors a definitive conviction, a legacy of knowledge on which the world might act when she had gone.

. . . . .

> Homicide may not be imputed to a defendant on the basis of mere suspicions, though they are the suspicions of the dying. 290 U.S. at 99-101.

The controlling South Dakota statute, Section 23-44-4, explicitly embodies essentially the same prerequisite that the statement he made under "the fixed and solemn belief that his death is inevitable and near at hand." In *State v. Swenson*, 26 S.D. 589, 129 N.W. 119 (1910), the rule was correctly applied.

Wharton emphasizes the necessity that the declarant have abandoned hope of recovery:

> (A) statement which indicates that the declarant retains some hope of recovery, and is not firmly convinced in his own mind that death is imminent, will not serve as a basis for the admission into evidence of a dying declaration made while in that frame of mind. 1 *Wharton on Evidence* at 710.

It is altogether obvious that the statements attributed to the deceased in the present case cannot even by conjecture be said to have been made under influnce of a hopeless belief in impending death: by their very terms and context they negative and exclude that possibility. The declarations were in response to and suggested by questions; more crucially, the challenged statements themselves were interrogatory in nature. Indeed the fact that it was a question—("You don't think . . . do you?")—conclusively suggests a mere suspicion, a suspicion the speaker was in fact unwilling to entertain or accept.

In this there is no shadow of impending death, no "settled hopeless expectation" of death, no consciousness of swift and certain doom—above all, no evidence that the declarant was charging murder "deliberately and solemnly as a fact within

[his] knowledge," that he was "announcing to the survivors a definitive conviction, a legacy of knowledge on which the world might act." All the evidence, all the circumstances are precisely to the contrary.

This was, we respectfully submit, not a mere evidentiary error to be loosely disposed of as within the trial judge's discretion. Rather, it was the clearly erroneous receipt of extraordinarily prejudicial material of such impact as to rise to a denial of due process. For here, as in *Shepard:* "The admission of this declaration, if erroneous, was more than unsubstantial error . . . . If the evidence was incompetent, the verdict may not stand."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of South Dakota.

Respectfully submitted,

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Dated: November 11, 1974.

APPENDIX

No. 11311

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA

vs.

JAMES LEROY NELSON

ORDER DENYING PETITION
FOR REHEARING

Petition for rehearing of the above cause having been filed July 31st, 1974, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices thereof requesting a hearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court the petition for rehearing is denied.

Dated at Pierre, South Dakota, this 16th day of August, 1974.

By the Court:
FRED R. DINANS
Acting Chief Justice

Attest:

(Seal)

Clerk of the Supreme Court

No. 11311-a-AR
IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff-Respondent,

vs.

JAMES LEROY NELSON,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HON. JOHN B. JONES
Judge

Opinion Filed July 11, 1974

KERMIT A. SANDE, Attorney General; MARVIN TRUHE, Assistant Attorney General, Pierre, South, Dakota, Attorneys for plaintiff-respondent.

THOMSON, WYLDE, NORDBY, FRIEDBERG & RAPPAPORT, St. Paul, Minnesota; DAVENPORT, EVANS, HURWITZ AND SMITH, Sioux Falls, South Dakota, Attorneys for defendant-appellant.

RENTTO, Judge.*

Defendant James LeRoy Nelson appeals from a judgment entered on a jury verdict finding him guilty of manslaughter in the second degree. It involved the death of Wayne Henry

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* Retired Supreme Court Judge acting under authorization pursuant to S.L. 1974, Ch. 154, §4.

Sherwood, an inmate in the South Dakota penitentiary, on October 4, 1971, from strychnine poisoning. He was sentenced to a term of twenty years to be served concurrently with a prior sentence he was then serving in that institution. It is inferrable from the record that the prior sentence was imprisonment for life on another homicide.

As grounds for reversal of the judgment he urges that:

1. The trial court erred to his prejudice in receiving hearsay statements attributed to the deceased which were not admissible as dying declarations, and
2. The evidence is insufficient to justify the verdict, and
3. The trial court erred to his prejudice in receiving in evidence the preliminary hearing testimony of an absent witness.

He also complains that our second degree manslaughter statute, SDCL 22-16-20, is unconstitutionally vague and that it was error to allow the jury to consider manslaughter as a lesser offense necessarily included in the prosecution which was one for murder. These two matters are not urged as reversible error but are discussed only as a part of the totality of circumstances.

The information filed against the defendant charged him and Patrick Bernard Pickering, another inmate, jointly with the murder of Sherwood. However, they were tried separately. Pickering was tried first. His trial was held at Mitchell, South Dakota, on a change of venue. He was found guilty of murder and sentenced to imprisonment for life. This judgment was recently affirmed. State v. Pickering, S.D., 217 N.W.2d 877. The opinion was filed four days before oral arguments were presented in this cause.

One of the grounds relied on in Pickering for reversal was the admission of the same hearsay statements urged in the

first ground listed above. This evidence was given by prosecution witnesses Hempel and Westcott, two inmates, who were with Sherwood just before he died. The statements were held to have been properly admitted.

Concerning the admissibility of such evidence SDCL 23-44-4 provides:

> "Dying declarations are statements of material facts concerning the cause and circumstances constituting the res gestae of any of the following felonies to wit: homicide, rape, as rape is defined in subdivisions (3) and (4) of § 22-22-1, and abortion, as abortion is defined in § 22-17-1, made by the victim voluntarily while sane and under the fixed and solemn belief that his death is inevitable and near at hand.
>
> "In all prosecutions for the following felonies to wit: homicide, rape, as rape is defined in subdivisions (3) and (4) of § 22-22-1, and abortion, as abortion is defined in § 22-17-1, the dying declarations of the deceased, as defined in this section, are always admissible in evidence, provided the deceased would be a competent witness if living.
>
> "All such declarations are also admissible in behalf of the defense."

Except as to the cases in which such statements are inadmissible it is basically a codification of the rule at common law.

As indicated in Pickering it is for the court to determine the admissibility of dying declarations. 40 C.J.S. Homicide § 295(d); 40 Am.Jur.2d, Homicide, § 374; Wharton's Criminal Evidence, 13th Ed., § 345. Because of infirmities inherent in such statements as evidence their admissibility should be clearly established. This seems to be our rule. State v. Mathis,

47 S.D. 577, 201 N.W. 153. See also 40 C.J.S. Homicide § 295(a); 40 Am.Jur.2d, Homicide, § 376. Proving this is the burden of the prosecution.

Many of the facts germane to the utterance of the statements here questioned are the same as those on which they were predicated in the Pickering case. Consequently we will not repeat them. To those interested they are available in the opinion in that case. However, other facts pertinent to this issue will appear in our discussion of the issue of insufficiency of the evidence. As held in Pickering the trial court in ruling on the admissibility of a dying declaration exercises a discretion and we may disturb that determination only when there has been a clear abuse of discretion.

Under our statute the statements must be voluntarily made and concern matter constituting the res gestae of the crime. In homicide prosecutions this restricts them to the facts leading up to or causing or attending the injurious act which resulted in the declarant's death. Wigmore on Evidence, 3rd Ed., § 1434; 40 Am.Jur.2d, Homicide, § 371; 40 C.J.S. Homicide § 298. The declarant at the time of making them must be sane and a competent witness if living. In addition to these the fundamental requirement is that he be under the fixed and solemn belief that his death is inevitible and near at hand.

From a careful study of the record we are satisfied all of these requirements were clearly established. That some of them were in response to inquiries does not render them involuntary. State v. Mathis, supra. As held in Pickering it is not necessary to show a statement by the victim that he was conscious of impending death. Such expectation may be inferred from the circumstances of his condition. The admission of these statements by the court was not an abuse of its discretion.

The thrust of his second ground is that the evidence is insufficient to establish that he knowingly aided Pickering in

administering poison to Sherwood. SDCL 23-10-3 provides that all persons concerned in the commission of a felony must be prosecuted, tried and punished as principals, whether they directly commit the act constituting the offense or aid and abet in its commission.

While there are many statements concerning the meaning of the terms aid and abet, 22 C.J.S. Criminal Law § 88(2); 21 Am.Jur.2d, Criminal Law, § 119; Wharton's Criminal Law and Procedure (Anderson) § 114, we like the definition the trial court gave the jury in its Instruction No. 21. It there said:

> "A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice the commission of such crime."

This seems to encompass all that we said the terms meant in State v. Johnson, 81 S.D. 600, 139 N.W.2d 232, and State v. McCreary, 82 S.D. 111, 142 N.W.2d 240, but does it more succinctly.

Concerning defendant's participation in the offense involved it appears that he and Pickering were close friends and that there was animosity between Pickering and Sherwood. About 8 o'clock on the evening of his death Sherwood was sitting on a trash box watching the Monday night football game on TV with several other inmates including Hempel and Westcott, when he was approached by Pickering and Nelson. Pickering patted Sherwood on the head and asked if he could see him in the barber shop restroom which was on the same floor. After this Pickering and Nelson went toward the restroom, followed seconds later by Sherwood. While the three of them were there it appeared to one inmate that Pickering was trying to talk to

Sherwood and he kept shaking his head as if to say "No". Then Pickering gave some blue pills to Nelson who indicated to Sherwood that they were "okay" after which Sherwood took the rest of the pills from Pickering. He swallowed them with a liquid.

Sherwood soon returned to the trash box where he had been sitting. Pickering and Nelson were not with him. He began complaining about not feeling well and started to turn blue in the face. An inmate near him notified a guard but he did not respond until called again. Sherwood then inquired of inmate Hempel "What kind were them blue pills that come in a capsule?" and said he just took some. He also said "You don't think Nelson and Pickering would give me any bum pills, do you?" He complained of having trouble breathing and seeing. He didn't believe he could walk and tried to stand but was unable to. On a visit to the petitentiary at about noon that day, Mrs. Pickering had delivered some strychnine to her husband in an amber brown colored bottle.

While still on the trash box inmate Westcott asked him if he had taken any pills—and reminded him that he had previously told him that he was going to get ahold of some bad ones to which Sherwood responded "You don't think Pat and him would do anything like that to me?", at which time he admitted that he had taken some pills from Pat. Both Pickering and Sherwood were users of pills which the inmates referred to as downers. Soon after that he started to have seizures or convulsions and turned from red to blue to black and had difficulty breathing. When the guard came to his assistance he kept crying for help until his voice faded and he began to gasp. The guard promptly summoned a stretcher. His condition deteriorated from normal to seriously ill in 10 minutes. He appeared to be rigid as he was carried out on the stretcher.

During the first week in October 1971 Nelson worked in the carpenter shop and was employed there until the 14th or 15th of that month when he was put in isolation. After breakfast on October 5th Pickering was seen handing a brown bottle with white substance in it to Nelson and told him to take it to the shop and stash it. Nelson took the bottle. On June 29, 1972 a small bag of white substance was discovered under a sanding machine in the carpenter shop.

The mere presence of a person at the scene of a crime does not make him a participant, but it is a circumstance which tends to support a finding that he is, and with other facts and circumstances may establish his guilt of the offense. State v. Peck, 82 S.D. 561, 150 N.W.2d 725; State v. Weinandt, 84 S.D. 322, 171 N.W.2d 73. While most of the testimony concerning Nelson's participation in the offense was necessarily from inmates, its believability was for the jury. The facts and circumstances shown are sufficient, if believed, to permit the jury to find beyond a reasonable doubt that defendant either participated in, or aided and abetted Pickering in the homicide involved.

His remaining complaint concerns receiving in evidence the testimony of William G. Baker given on direct examination when he testified for the state at the preliminary hearing held for Nelson in this matter in December 1971. He was an inmate in the penitentiary at the time of Sherwood's death and also at the time of Nelson's preliminary hearing. Thereafter he was released from the penitentiary and left the state but willingly returned at the request of the state and testified for it at the trial of Pickering in July of 1972. He was then advised by the states attorney that he would be wanted as a witness at Nelson's trial and was requested to inform the prosecution of any changes in his address or circumstances. This he agreed to do but never did.

About three weeks before the commencement of this trial which began on February 26, 1973, the state initiated efforts to locate Baker at his former places of residence. It learned that he could not be located in these places and further that on November 14, 1972 a warrant for his arrest for passing a forged and counterfeit check had been issued in Gibson County, Tennessee. The authorities there sent warrants for his arrest to two places where they had reason to believe he might be, but to no avail. They also entered his name in the National Crime Information Center computer in Washington, D.C. In addition a Federal warrant for his arrest as a fugitive was issued through the F.B.I. None of these authorities were able to locate him. Nor did his in-laws at Mitchell, South Dakota have any knowledge as to his or his wife's recent whereabouts.

In State v. Heffernan, 22 S.D. 513, 118 N.W. 1027, this court held it was error to read from the stenographer's transcript the testimony on prelimniary examination of witnesses for the state who were then absent from the state. On rehearing this holding was reversed. State v. Heffernan, 24 S.D. 1, 123 N.W. 87, 25 L.R.A., N.S. 868, 140 Am. St. Rep. 764. In State v. Carr, 67 S.D. 481, 294 N.W. 174, the court adhered generally to the rule announced on rehearing in Heffernan but recast it to read thus:

> " 'The testimony given by a witness on the preliminary examination or on a former trial is not admissible as substantive evidence, unless it is satisfactorily shown by the side offering the evidence that such an examination or trial was had in a judicial tribunal; that the witness was sworn and testified; that accused was present and had an opportunity for cross-examination; that the parties and the issues were substantially the same as in the case on trial; and that the witness has since died, or has become

insane or has left the state permanently or for an indefinite time, or is unable to attend and testify on account of sickness or physical disability, or after due diligence cannot be found.' "

On the first day of this six-day trial the state advised the court and the defendant of its inability to locate Baker and of its plan to introduce his testimony given at the preliminary hearing. The court delayed ruling until it was offered as the last item of evidence in the state's case.

The preliminary hearing at which the evidence in question was given was held in the Municipal Court of Sioux Falls, before a judge pro tempore of that court. Baker was sworn before testifying and Nelson was present with his counsel who cross-examined the witness. The complaint on which the hearing was held charged defendant and Pickering with the murder here involved. This evidence was properly received under the rule of State v. Carr, supra. We are unwilling to depart from that rule, even to the extent requested by defendant.

Moreover, before this testimony was read to the jury the defendant, at an in camera hearing, was permitted to interpose objections to any of it. He objected to many of the questions, all of which were sustained except one. Defendant's request that his cross-examination of the witness at the preliminary hearing be not read to the jury was granted, as was his further request that the jury be advised that Baker was a fugitive from justice. This was done by the trial judge. Also his counsel was permitted to read to the jury, from the F.B.I. records, the list of the absent witness' convictions of felonies. In the interest of fairness the court went further than the extra mile.

Affirmed.

All the Justices concurred.

RENTTO, Retired Judge, sitting for DOYLE, J., disqualified.